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ABSTRACT

This checklist is designed to reduce the prospect that a termination decision will be reversed in a grievance procedure, arbitration, state agency hearing, or court proceeding. The checklist is arranged under the following headings: (1) What is the real reason for considering firing this individual? (distinction between reduction-in-force and termination, warning against subterfuge); (2) Is the reason job-related? (It must be related to contractual provisions and impinge on job performance); (3) Are the reasons supported by documents from the personnel file? (4) Are there steps that must precede consideration of termination? (statutory and/or contractual requirements for evaluation, opportunity for remediation, assistance, etc.); (5) termination procedure; (6) possible forums for employee remedies; and (7) final statutory and constitutional rights checklist. An attachment is provided, detailing special problems in collective bargaining states. These include remedies based on collective bargaining law, the more controversial contract clauses, the duty to bargain, and a reference for the standard of judicial review of arbitration awards. (TE)

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HOW NOT TO GET SUED WHEN YOU FIRE SOMEBODY

Joe B. Richards
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Paper presented at the Annual Meeting of the National School Boards Association, Houston, Texas, March 31-April 3, 1984.

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Clinic No. D-67 Speaker: Richards (Oregon)

NSBA 1984 CONVENTION CLINIC, Houston, Texas

"How Not to Get Sued When you Fire Somebody"
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TERMINATION OF AN EMPLOYEE:
CONSIDERATIONS NECESSARY TO MINIMIZE THE RISK OF LEGAL ACTION

In the termination of an employee consider the following checklist to reduce the prospect that the termination will be reversed in a grievance procedure, arbitration, state agency hearing, or court proceeding.

(School districts that are not subject to state collective bargaining laws or written contracts with employees may disregard those portions of the checklist and the Attachment.)

___ I. WHAT IS THE REAL REASON FOR CONSIDERING FIRING THIS INDIVIDUAL?
___ A. Distinguish reduction in staff (RIF), and termination for personal reasons
___ 1. Reasonableness standard in RIF
___ 2. Seniority restrictions on order of reduction
___ B. Be certain the termination is not a subterfuge for impermissible reasons
___ 1. Reprisal: lay-off for financial reasons asserted after an employee criticism of school board is suspect. Zoll v. East Alamakee Sch. Dist., 588 F2d 246 (C.A. 8 1978)

___ II. IS THE REASON JOB-RELATED?
___ A. If not, how does the reason affect performance?
___ 1. Is the reason permissible under contract, statute and/or Constitution? (Example: criticism may be protected as free speech.)
___ 2. Must ~~impact~~ job performance. (Example: out-of-school behavior may impact policy requiring teachers to maintain sound public relations with parents.)
___ B. If job-related:
___ 1. Determine whether for personal reasons or for non-personal (financial or reduction-in-staff reason)
___ 2. What is the legal authority for the personal cause termination?
___ (a) Contract provisions
___ (b) Statute
___ (i) standard for classified
___ (ii) standard for probationary teachers
___ (iii) standard for permanent teachers
___ (iv) standard for administrators
___ (c) Board policy (Board must always comply with own rules)
___ (d) Professional code on competent/ethical educator
___ (e) Past practice
___ (f) At-will employment

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___ III. ARE THE REASONS SUPPORTED BY DOCUMENTS FROM THE PERSONNEL FILE?

___ A. Contractual requirements
___ B. Statutory requirements
___ "If it isn't written down, it never happened." (William Carey, 1981)

___ IV. ARE THERE STEPS THAT MUST PRECEDE CONSIDERATION OF TERMINATION?

___ A. Statutory duties
___ 1. Evaluation requirement
___ 2. Plan of assistance requirement
___ B. Contract duties
___ 1. Evaluation requirement
___ (a) Application of Just Cause
___ (b) Reasonableness (not arbitrary nor capricious)
___ 2. Plan of Assistance requirement
___ (a) To assist, not document decision to fire
___ C. Progressive discipline
___ D. Constitutional requirements
___ 1. Pre-termination hearing required if expectation of continued employment (property interest).
Board of Regents v. Roth, 408 U.S. 564, 577 (1972)
Vanelli v. Reynolds School District No. 7, 667 F2d 773, 777 (C.A. 9, 1982)

___ V. TERMINATION PROCEDURE
___ A. Statutory or contractual steps required
___ 1. Notice
___ (a) Must notice precede fact of termination
___ (b) Detail required
___ (c) Timeliness
___ 2. Type of hearing
___ (a) Scale, cross-examination, representative, etc.
___ 3. Impartial decision maker. School board is impartial.
Hortonville School District v. Horton Education Association, 426 U.S. 482 (1976).
___ 4. Procedure after hearing (notification)
___ 5. Appeal

___ VI. POSSIBLE FORUMS FOR EMPLOYEE REMEDIES
___ A. Appeal to school board
___ B. Appeal to State agency
___ C. Arbitration
___ D. Court, including §1983 damage actions
___ E. Other

___ VII. FINAL STATUTORY AND CONSTITUTIONAL RIGHTS CHECKLIST

(This is the place where many employers have been in trouble.)

___ A. First Amendment - Federal Constitution (Corresponding state constitution provisions may grant more protection.)

___ 1. Every public employee is largely free to express his views. Anderson v. Evans, 660 F2d 153, 157 (CA 5, 1981).

___ 2. Social worth of statement not required. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

___ 3. Balancing test: right to comment on matters of public concern versus interest of public body in promoting efficiency of service it performs. Pickering v. Board of Ed., 391 U.S. 563 (1968).

___ (a) Must involve matters of public concern. Connick v. Myers, 103 S.Ct. 1683 (April, 1983). See also McKinley v. City of Eloy, 705 F2d 1110 (CA 9, 1983).

___ 4. Causation: Did protected activity play a substantial part in the termination? Mt. Healthy v. Doyle, 492 U.S. at 287 (1977); Doyle v. Mt. Healthy, 670 F2d 59 (CA 6, 1982).

___ B. State action under color of law that denies rights secured by the Constitution and laws. 42 USC §1983.

___ C. Discrimination right under 42 USC §2000(e), et. seq.

___ D. Channel rules

___ 1. Policies prohibiting unauthorized speech are unconstitutional.

___ 2. Narrow policies requiring submission of complaints to superior before bringing to the public. Pickering v. Board of Ed., 391 U.S. at 573, n.4 (1968).

___ 3. Collectively bargained channel rules. Do unions have the power to surrender constitutional rights of teachers?

A T T A C H M E N T

SPECIAL PROBLEMS IN COLLECTIVE BARGAINING STATES

I. REMEDIES

A. Public Employee Collective Bargaining Law (PECBL) may define a public body's violation of the collective bargaining law as an unfair labor practice (ULP) and provide sanctions by the Public Employment Relations Board (PERB)

B. Employee associations may have power to bargain for binding arbitration

1. No effective court review in most states
2. 79% of the large school districts had binding arbitration contracts in a study of 80 districts over 15,000 Adm. Goldschmidt, et al "The Extent of Educational Policy Bargaining", University of Oregon, July, 1983.

C. Are both state dismissal law remedy and contractual arbitration remedy available to the employee?

D. Consider facts that the Fourteenth Amendment due process guarantees are sufficiently met by administrative proceedings such as grievance-arbitration procedure and Employment Relations Board review, as held in Pederson v. S. Williamsport Area School District, 677 F2d 312, 316-17 (C.A. 3d 1982); cert den., 103 S.Ct. 305 (1982) and that Federal courts should, therefore, decline jurisdiction for discharge cases brought under §1983.

II. THE MORE CONTROVERSIAL CONTRACT CLAUSES

A. Definition of "grievance"

1. Determine topic subjected to binding arbitration
2. References to board policy and practice
3. External law

(a) example: "Nothing in this contract shall deny any teacher their rights under applicable law and regulations" held not to incorporate external law in St. Albans (Vt.) Ed. Assoc. and St. Albans Board, 141 AIS 4 (McCrory Arb.) (1981); nor was the general language that the provisions of the contract are "subject to" the laws of Oregon sufficient to incorporate the statutory evaluation proicedures into the contract. Smith v. School District 45, 63 Or. App. 685, 694, 666 P2d 1345 (1983).

B. Progressive Discipline

Some arbitrators imply a system of progressive discipline which includes an oral warning, written warning, reprimand, then termination. See School Grievance Arbitration, Brody & Williams, Butterworth Legal Publishers, 160 Roy Street, Suite 100, Seattle, WA 98109.

C. Just Cause

Many contracts require that there be "just cause" for discipline, without defining the term. Opinions of arbitrators have developed a "common law definition" that includes: (1) forewarning of consequences, (2) the rule or order violated was reasonable, (3) a reasonable effort was made to determine whether there was a violation of the rule or order, (4) investigation was conducted objectively, (5) the investigation produced substantial evidence of violation, (6) employer has applied rules and orders even-handedly, and (7) the degree of discipline is reasonably related to the seriousness of the offense and the prior service record.

Compare the clause which states "No action shall be found to have been taken without just cause in the absence of proof that such action was arbitrary or capricious or in violation of law."

Just cause clauses have been implied [Because a seniority clause for lay-off is inconsistent with at-will discharges. Sweetwater and Cal. Union High District v. Sweetwater Ed. Assoc., 124 AIS 8 (Ross Arb.)(1980).]

D. Evaluation

1. Contract may be silent on the subject of evaluation
2. Nevertheless some arbitrators feel empowered to judge the reasonableness of observations and evaluations and require that termination for such evaluations be made at a time near their occurrence instead of waiting until some time in the future when memories are unreliable or witnesses unavailable. Northport School District and United Teachers of Northport, 98 AIS 12 (McKevly Arb.) (1978). One arbitrator found a "covenant of fair dealing" to be implicit in evaluation procedures. St. Vrain Valley (Colo.) School District and St. Vrain Valley Ed. Assoc., 93 AIS 3 (Linn Arb.) (1977). A reasonableness standard is obviously a less stringent standard for review than just cause or covenant of fair dealing.

E. Employment Discrimination

1. Types of contract clauses
2. Prior resort to arbitration does not constitute a waiver of later judicial relief, in the absence of an "election of remedies" provision in the contract. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

III.

A. The Duty to Bargain

1. Mandatory subjects of bargaining
2. Permissive subjects of bargaining
3. Illegal subjects of bargaining

See NOLPE 1983 Yearbook of School Law, Chapter on "Bargaining", pp. 95-111

B. There is no duty to bargain permissive subjects such as the process for non-renewal. But if the district bargains and agrees to arbitrate such matter it must abide by the agreement. Central Point School District v. ERB, 27 Or. App. 285, 555 P2d 1269 (1976).

IV. STANDARD OF JUDICIAL REVIEW OF ARBITRATION AWARDS
See NOLPE 1983 Yearbook of School Law, pp. 127-137.